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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 744

COMMONWEALTH OF KENTUCKY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION

The Commonwealth of Kentucky, Petitioner, hereby petitions the Court for a writ of certiorari to be issued to review a judgment of the United States Court of Claims entered December 3, 1958, granting motions for summary judgment by the Respondent, United States of America. The decision and judgment below is reported in 168 F. Supp. 219. (See Appendix I attached to Petition of Hughes Transportation, Inc.)

STATEMENT OF JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are:

1. The Court of Claims has decided an important question of Federal Constitutional and statutory law against the validity of State minimum rate regulation of intrastate contract motor carriers using State highways for transportation of Government property which has not been, but should be, settled by this Court; and such decision is in conflict with applicable decisions of this Court, including *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261 (1943).

2. The decision of the Court of Claims nullifying the application of State minimum contract carrier rate laws to intrastate transportation of property for the United States impairs the integrity and effectiveness of such laws contrary to the Tenth Amendment of the Constitution of the United States.

3. The decision and judgment of the Court of Claims of which review is sought was decided and entered on December 3, 1958.

4. Title 28, U. S. Code, Sections 1255(1) and 2101(c) (Act of June 25, 1948, c. 646, 62 Stat. 928, 961) are believed to confer on this Court jurisdiction to review the decision and judgment in question by writ of certiorari where, as here, the Petition is filed within ninety days after entry of such judgment.

QUESTION PRESENTED

The question presented for review is whether in an action by a motor vehicle contract carrier to recover charges for transportation of property of the United States between points entirely within Kentucky on the basis of nondiscriminatory minimum tariff rates prescribed by Kentucky law such requirement of Kentucky law is invalid under the Constitution and laws of

the United States, where such State law allows no rate exception for transportation of property of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article VI, Clause 2, and the Tenth Amendment of the Constitution of the United States; and the relevant provisions of the Armed Services Procurement Act of 1947 (Act of February 19, 1948, c. 65, 62 Stat. 21 *et seq.*), Chapter 281, Kentucky Revised Statutes, and Regulations under such Kentucky statutes are set forth in Appendix II attached to Petition of Hughes Transportation, Inc.

STATEMENT OF THE CASE

Beginning in 1948 and from time to time through the year 1952 Hughes Transportation, Inc. transported numerous truckloads of explosive materials for the Department of the Army. All of such transportation involved in these suits took place on the highways of and between points entirely within the State of Kentucky under contract carrier permits granted by the Division (Department) of Motor Transportation of Kentucky.

Hughes had quoted rates to the Government for the transportation of "Class A-Explosive Ammunition" between interstate points and between Kentucky points, effective March 13, 1950, as follows:

"Subject to Rail or Motor Truck Rates which ever is lower,

Minimum Weight	Classification
20,000	75%
*25,000	65%

Less Truck Load Shipments subject to Rail Less Carload Rates Or Motor Truck Less Truck Load Rates whichever is lower.

* Bills of lading may be cross referenced on any particular shipment to take advantage of lower classification."

Hughes submitted bills to the Government and collected charges for its transportation of Army explosives at rates which were less than those prescribed by Kentucky Law, as contained in an applicable intrastate motor carrier tariff on file with the Kentucky Department of Motor Transportation. After Hughes had transported numerous shipments of Army explosives a dispute arose over the proper interpretation of Hughes' rate quotation of March 13, 1950. The General Accounting Office, claiming that the charges made thereunder were higher than provided therein, deducted the claimed excess from amounts due Hughes for later transportation services.

Hughes sued the United States in the Court of Claims (Case No. 525-52) for the amounts withheld by the General Accounting Office and, in the alternative, for the higher difference between the amounts collected and the amounts required under the intrastate motor carrier tariff rates prescribed by the Kentucky Statutes and Regulations thereunder. The jurisdiction of the Court of Claims was invoked under Title 28, U. S. Code, Section 1491 (Act of June 25, 1948, c. 646, 62 Stat. 940). The Commonwealth of Kentucky intervened and contended that Hughes was required to recover the minimum rates prescribed by Kentucky law. The parties filed cross-motions for summary judgment.

By its decision on May 4, 1954 (*Hughes Transp. Inc. v. United States*, 121 F. Supp. 212, 128 Ct. Cl. 221), the Court of Claims interpreted Hughes' quotation to the Army as requiring the application of the higher minimum uniform tariff rates prescribed by the Kentucky Law and thereafter on October 5, 1954, entered judgment in favor of Hughes for $122,834.31. Meanwhile Hughes had filed an additional suit in the Court of Claims (Case No. 208-54) based on similar intrastate Kentucky shipments for the Army and claiming the difference between the amounts collected or retained and the amounts required under the Kentucky tariff.

The Government moved for reconsideration of the decision of May 4, 1954, and requested, in the alternative, that it be allowed to offer evidence showing that Kentucky had in fact exempted the explosives transported from the rates prescribed by the Kentucky tariff. The Court of Claims, on July 12, 1955, granted the last alternative request and referred the matter to a Commissioner to take evidence. No further action was taken by the Commissioner on the referral.

Following the decision of this Court in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (1958) the Government again filed motions for summary judgment and dismissal in both cases before the Court of Claims, based solely on the *California* decision of this Court. The Court of Claims, by its decision of December 3, 1958, of which review is sought by this Petition, held that for the reasons stated in a decision entered on the same day in *Union Transfer Co. v. United States*, 168 F. Supp. 217, the imposition of the prescribed Kentucky tariff rates was ineffective and granted the Government motion for summary judgment to that extent.

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT

The Government motion for summary judgment and its grant by the Court below was based solely upon the decision of this Court in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534. The opinion of the Court below (168 F. Supp. 219) stated its decision on this point as follows:

> The Government has made, in each case, a motion for summary judgment. It says that the decision of the Supreme Court of the United States, of January 7, 1958, in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, is controlling in these cases, and that the attempt of the Commonwealth of Kentucky to impose its prescribed rates upon these shipments is ineffective. For the reasons given in the case of *Union Transfer Co.*, No. 527-56, this day decided, we sustain the Government's position, and to that extent the Government's motions are granted.

The reasons referred to in its contemporaneous decision in *Union Transfer Co.* v. *United States* (Ct. Cl. No. 527-56) 168 F. Supp. 217 were stated as follows:

> "The Government has filed a motion for summary judgment, on the asserted ground that the Supreme Court of the United States, on March 3, 1958, in the case of *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 held that a state could not constitutionally regulate rates to be charged to the United States for transportation such as that here involved.
>
> "The plaintiffs urge that the *California* decision is distinguishable. They point out that the California statute which was held to be unconstitutional authorized the California Commission to permit carriers to transport property for the United States at reduced rates, "to such ex-

tent and subject to such conditions as (the Commission) may consider just and reasonable." That meant that a reduced rate which was agreeable to the United States and the carrier would have to be submitted to and approved by the Commission before it would be lawful. They point out that there was no such unwieldly procedure in Nebraska; that Nebraska prescribed uniform rates for all shippers, including the United States, and hence did not invite or require or permit the United States to seek the approval of the Commission for reduced rates.

The Plaintiffs argue that all that the Nebraska laws and tariffs did was to make the cost of shipments by the United States greater than it would have been if the carriers, willing to carry for less, had been allowed to do so. The plaintiffs quote certain language from the Supreme Court's opinion, which, they urge, shows that the objectionable feature of the California statute was not the increase in costs which it caused, but the inconvenient procedure prescribed by it. We think the plaintiffs' argument is a legitimate one, in view of some of the language in the Supreme Court's opinion, but, reading the opinion as a whole, we think the *California* decision governs the instant case, and that Nebraska's attempt to impose its prescribed rates upon the United States is invalid, because it is in violation of the Supremacy Clause of the Constitution of the United States.

The decision of the Court of Claims misapplies the *California* case. It ignored the very differences in circumstances relied upon by the majority of this Court in the *California* case to distinguish it from its earlier decision in *Penn Dairies, Inc. v. Milk Control Comm.*, 318 U.S. 216 (1948) among others.

In the *California* case the State statute declared unconstitutional attempted to vest discretionary authority

in a State agency to determine in individual cases whether and to what extent reduced rates for common carrier transportation services to the Government would be permitted. This Court emphasized those discretionary provisions of such State law as the basis for its decision against validity of the State law (355 U.S. at pp. 535, 537, 538, 540). Here in Kentucky, however, the State has only enacted statutes and regulations thereunder which prescribe nondiscriminatory minimum rates for contract motor carriers of property at the level of the lawfully filed tariff rates of common carriers by motor vehicle. (Ky. Rev. Stats. (1948), §§ 281.240, 281.250; Ky. Rev. Stats. (1950), §§ 281.590, 281.685, 281.695; Department of Motor Transportation Regulations, (1942) D. M. T. Nos. 1(B); (1945) D. M. T.-12, Part II, Par. 11; DMT-15 (II 6) 1950; (1952) DMT 6.04; *Baker* v. *Glenn*, 2 F. Supp. 880 (D. C. E. D. Ky., 1933))

In the *California* case this Court distinguished its decision in *Penn Dairies*, by referring to a conflict in the later case between a federal policy of negotiated rates and a State policy of regulation of such negotiated rates. But *Penn Dairies* upheld State prescribed minimum rates on Government contracts where as here the only possible impact on the Government is to increase its costs (318 U.S. at p. 270). In a suit in the Court of Claims to collect lawfully prescribed rates after the transportation event none of the preshipment regulatory impediments to Government shipments referred to by this Court in the *California* case exist or would be relevant. In such a case like this the only impact on the Government is the amount to be paid for the service.

The Armed Services Procurement Act of 1947, which was in effect at the time of the shipments here involved, did not in express terms set aside otherwise valid State law prescribing minimum rates for contract transportation services to the Government. Nor were there at that time any federal regulations lawfully prescribed thereunder which either expressly or impliedly required nullification of such State laws. That federal Act was derived from a long series of enactments referred to and analyzed in *Penn Dairies* (318 U.S. at pp. 271-275). The then effective comparable statutes, substantially the same as the Armed Services Procurement Act of 1947, were held in *Penn Dairies*, not to require the conclusion that they evidenced a federal policy in conflict with State minimum price laws. (318 U.S. at p. 275). The decision in the *California* case does not overrule the decision in *Penn Dairies* but distinguishes it on grounds which make the *California* decision inapplicable to this case.

The regulation of the intrastate rate contracts of private motor carriers who use State highways to carry on their business has long been recognized as a legitimate subject of State concern under the police powers reserved to the States by the Tenth Amendment. The prescription of non-discriminatory minimum rates for such contract motor carriers to protect the public interest in the maintenance of State highways and their use by carriers has been specifically upheld by this Court as a part of that police power. *Stephenson* v. *Binford*, 287 U.S. 251, 273-276 (1932).

The decision of the Court below, nullifying such State prescribed minimum contract rates insofar as

applicable to shipments of Government property over State highways substantially destroys the effectiveness of the Kentucky laws referred to above. Rate cutting practices of contract motor carriers in competition with common carriers for Government business can only result in inability of the States effectively to control the use of their highways for purposes of transportation. Transportation of Government property within Kentucky, in common with other areas of the United States, is so great in comparison with other non-Government traffic that the nullification of State minimum rate laws in this area impairs the integrity of and goes far to make ineffective a large part of such State regulation of carriers rendering transportation services generally.

Respectfully submitted,

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